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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER,

Petitioner,

v.

ALLEGHENY AIRLINES, INC.,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

		Page
I.	THE CIVIL AERONAUTICS BOARD IS NOT EMPOWERED TO SANCTION TORTIOUS MISREPRESENTATIONS BY ITS REGULATEES	1
II.	THE CAB HAS NEVER APPROVED CONCEALMENT OR MISREPRESENTATION OF MATERIAL FACTS REGARDING OVERBOOKING	4
III.	THIS CASE DOES NOT INVOLVE THE PRIMARY JURISDICTION DOCTRINE	9
CONCLUSION		11

TABLE OF AUTHORITIES

Cases:

Carnation Co. v. Pacific Westbound Conference,
383 U.S. 213 (1966) 3, 9, 10, 11

Delta Airlines, Inc. v. CAB,
455 F.2d 1340 (D.C. Cir. 1971) 11

Far East Conference v. United States,
342 U.S. 570 (1952) 9

Federal Maritime Commission v. Seatrain Lines,
411 U.S. 726 (1973) 3

General American Tank Car Corp. v. El Dorado Terminal Co.,
308 U.S. 422 (1940) 10

Page

Lichten v. Eastern Airlines, Inc.,
189 F.2d 939 (2d Cir. 1951) 10

Northern Pacific Ry. v. Solum,
247 U.S. 477 (1918) 9

Port of Boston Marine Terminal Assn. v.
Rederiaktiebolaget Transatlantic,
400 U.S. 72 (1970) 10

REA Express, Inc. v. CAB,
507 F.2d 42 (2d Cir. 1974) 2

Ricci v. Chicago Mercantile Exchange,
409 U.S. 289 (1973) 9

Southwestern Sugar & Molasses Co. v. River
Terminals Corp.,
360 U.S. 411 (1959) 4, 10

Texas & Pacific Ry. Co. v. Abilene Cotton
Oil Co.,
204 U.S. 426 (1907) 9

Thompson v. Texas Mexican R. Co.,
328 U.S. 135 (1946) 10

United States v. Western Pacific R.R. Co.,
352 U.S. 59 (1956) 10

United States Navigation Co. v. Cunard
Steamship Co.,
284 U.S. 474 (1932) 9

Vogelsang v. Delta Airlines, Inc.,
302 F.2d 709 (2d Cir.) *cert. denied*,
371 U.S. 826 (1962) 10

Page

Statutes:

Federal Aviation Act of 1958, as amended . . . . . *passim*

Section 404(b), 49 U.S.C. §1374(b) 7
Section 408, 49 U.S.C. § 1378 3
Section 409, 49 U.S.C. § 1379 3
Section 411, 49 U.S.C. § 1381 . . . . . 2, 11
Section 412, 49 U.S.C. § 1382 3
Section 414, 49 U.S.C. § 1384 3

CAB Orders, Notices and Regulations:

Economic Regulations, 14 C.F.R. § 221.170, *et seq.* . . 4

Notice of Proposed Rule Making, EDR-95,
30 F.R. 13236 (1965) 5

Notice of Proposed Rule Making, EDR-109,
32 F.R. 459 (1967) 6

Notice of Proposed Rulemaking, EDR-248,
38 F.R. 15083 (1973) 7

Other Authorities:

Comments of Ozark Air Lines, Inc. on Proposed
Rules (EDR-95), CAB Docket 16563 (Feb.
1966) 6

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I. THE CIVIL AERONAUTICS BOARD IS NOT EMPOWERED TO SANCTION TORTIOUS MISREPRESENTATIONS BY ITS REGULATEES.

A fundamental weakness in the decision below is its assumption that Congress has granted the Civil Aeronautics Board authority to approve fraudulent transactions on the part of its regulatees. As pointed out in Petitioner's opening brief (pp. 45-46), the statute under which the CAB operates contemplates the *elimination* of unfair and deceptive practices from the airline industry, not

their immunization from common law liability. Like the court below, Respondent is unable to point to any language in the Federal Aviation Act or its legislative history even remotely suggesting CAB authority to affirmatively sanction deliberate misrepresentations or omissions of material facts by an air carrier in its dealings with the public. It has merely argued that "a regulatory statute may contemplate conduct which would be unlawful but for the regulatory legislation." (Resp. Br. p. 43). The issue here, however, is not whether Congress *could* pass a law empowering the Board to approve deceptive practices, but whether Congress in fact did so.

Section 411 of the Aviation Act sets forth the duty of the Board to investigate and eliminate unfair or deceptive practices in air transportation, but nowhere does it or any other provision suggest that the Board may approve or foster practices that are unfair or deceptive.[1] The general public interest in seeing that the airline industry is reasonably profitable and on a sound financial footing certainly cannot be translated into a roving power for the CAB to license deceit or fraud, particularly in light of the strong policy against unfair and deceptive practices in the Federal Aviation Act and its legislative history. (See Pet. Br. at 38-39, 46.)

Nor is it proper to imply authority to sanction common law fraud from the Aviation Act since, where Congress has intended to permit the CAB to immunize otherwise illegal activities, it has expressly conferred such

[1] Under 411 the Board has broad discretion not to exercise jurisdiction over practices that may be deceptive in fact, but its inaction in such cases in no way precludes private parties from seeking relief through civil litigation, based on theories other than section 411. See *REA Express, Inc. v. CAB*, 507 F.2d 42 (2d Cir. 1974).

power in the statute. Thus, section 408 empowers the Board to approve certain consolidations, mergers, and other transactions, section 409 permits the agency to approve certain interlocking relationships, and section 412 contemplates that it may approve pooling, price fixing, market division, and other agreements, but in each instance the immunity flowing from approval by the Board is expressly provided for by section 414.[2] There is, of course, no comparable section in the Aviation Act that would permit the agency to approve fraudulent misrepresentations, or to protect air carriers from common law liability. Significantly, the Board itself has never asserted, or even suggested, that it might have such a power, and nothing suggested by Respondent or the court below can be read as granting that power to the Board.[3]

[2] As noted in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 222 (1966), an agency's powers under such provisions are prospective only, and could not be exercised retroactively to immunize past conduct from civil liability for treble damages. Moreover, this Court has repeatedly emphasized that a statute conferring such approval and immunizing powers upon an agency, in derogation of other aspects of public policy, must be read narrowly, not broadly. *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726 (1973). And as the Court made clear in *Seatrain*, the fact that there might be areas over which no power of approval was granted by Congress does not justify the courts in rewriting the statute to supply the missing powers. The reasons for judicial restraint in expanding agency powers are, we suggest, at least as compelling in the context of sanctioning fraudulent or deceptive practices as in an antitrust context.

[3] The CAB's express statutory powers to pass upon duly filed airline tariffs – including those limiting a carrier's liability or otherwise altering its common law duties – are not involved here, because nothing in Allegheny's tariffs provides for concealed overbooking or exclusion of liability for its deliberate misrepresentations. If such a tariff existed, and had not been summarily

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II. THE CAB HAS NEVER APPROVED CONCEALMENT OR MISREPRESENTATION OF MATERIAL FACTS REGARDING OVERBOOKING .

In Part I of its Argument, Respondent asserts that the CAB's 1967 rulemaking action "indisputably approves the airline industry's overbooking practices, including the industry's policy of nondisclosure." (Resp. Br. at 26). This, of course goes far beyond the holding of the court of appeals, which concluded that the CAB had never resolved whether deliberate overbooking, or its deliberate concealment from the public, are deceptive practices. (Pet. App. A 32.) Under the theory now urged by Respondent, the purpose of a referral to the CAB would simply be to determine whether that carrier's deceptive reservations practices fall within the ambit of the Board's purported industry-wide sanction of concealed overbooking.

If, indeed, the CAB had taken the action ascribed to it – assuming that it had the power to do so – and if Allegheny's conduct was within the scope of the CAB's approval, the continuing validity of a common law right of action arising out of that conduct would be drawn into serious question. The issue here, then, is whether

[3] (continued) rejected by the CAB, a different case would be presented. *Cf. Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959). Certainly the submission to an official in the CAB's Bureau of Economics of portions of a manual provided only to Allegheny's employees, which in fact *conceals* the practice of overbooking (see Pl. Exh. 6, JA 145, 148), cannot be considered the "functional equivalent" of a tariff providing for overbooking, despite Respondent's suggestion to the contrary. (Resp. Br. p. 20, n. 3.) Tariffs, unlike a company manual, are required to be available for public inspection and copying at each office of the airline, and its employees must assist interested persons in securing information from them. See 14 CFR § 221.170, *et seq.*

the CAB has ever sanctioned misrepresentations or the concealment of material facts regarding reservations by the industry at large or by any particular carrier such as Allegheny. We think it plainly has not.

First, the Board's 1967 decision not to impose a proposed affirmative passenger notification rule (EDR-95, 30 F.R. 13236 (1965)) cannot be regarded as an approval of deceptive practices. That proposal would have required each airline to identify each flight which became overbooked either inadvertently or intentionally, to determine which particular passengers would be denied boarding if everyone showed up for the flight and, no less than 12 hours before scheduled departure, to contact each of them with a warning about the possibility of their being bumped. In response to the proposal, the airlines argued that compliance would have been beyond the capabilities of their reservations systems as then operated. They pointed out, for example, that it would have been virtually impossible to figure out which passengers would have to be notified pursuant to the denied boarding priority rules. The cost of processing the information, and of personally contacting what the carriers estimated would be millions of individual passengers annually by telephone, some by long distance, would have been enormous. Moreover, the carriers demonstrated that the result of this warning in the great majority of cases would have been to unduly alarm and enrage passengers who would in all likelihood be accommodated on their proper flights. The carriers saw the proposal as excessively rigid and unworkable, and one that would do far more harm than good. This was particularly so, they said, in light of evidence that the vast majority of oversales at that time were caused by factors other than overbooking, such

as human error, communications breakdowns, and substitution of smaller aircraft for maintenance or operational reasons.[4] (JA 172-177.)

After considering the industry's objections, the Board agreed that the notification rule as proposed would in fact be too burdensome and inflexible, without corresponding benefits. EDR-109 (Jan. 10, 1967) (JA 170-194). For that reason it decided to drop its earlier proposal and approach the problem from an entirely different angle – seeking, in effect, to develop incentives for carrier innovation and improvement in their reservations systems. While the Board was obviously aware in 1967 that some airlines did use overbooking as a reservations strategy – although it is equally true that other airlines did not[5] – there was nothing in the record to suggest that the problem was the massive one it has since become, with over

[4] In 1967 it could legitimately be argued that overbooking was responsible for few if any actual oversales. Since then, however, computers and communications technology have literally revolutionized airline reservations systems. Practices such as "free sale" and "block ticketing," which the CAB criticized in 1967, have been virtually eliminated. Overbooking as practiced today by Allegheny is a systemwide statistical program applicable to all flights by means of sophisticated computer methodology, quite a different process than the occasional practice used primarily at the discretion of local station managers 10 years ago.

[5] "The *only* reasons for overbookings and for oversales on Ozark are personnel errors by employees of Ozark, other air lines or travel agencies, and breakdowns or defects in communications resulting in delayed delivery or non-delivery of status information." Comments of Ozark Air Lines, Inc. on Proposed Rules (EDR-95), Docket 16563 (Feb. 2, 1966), at p. 3. See also Pet. Br. at 27-28, n. 19.

100,000 passengers being denied boarding annually. (See Pet. Br. p. 9, n. 6.) No one suggested in 1967 that all overbooking should be prohibited, and what the Board did was merely decline to approve a program that would have required, among other things, millions of calls to be made to prospective passengers and substantial changes in carrier practices and facilities. That is hardly the same as "approving" overbooking in any affirmative sense, and it certainly is not tantamount to authorizing the airlines to engage in deliberate concealment or misrepresentation of their practices. The fact is that the CAB in 1967 and subsequently has made clear that the right of any bumped passenger to sue the airline is preserved, a fact that simply cannot be reconciled with Respondent's version of what was done. If the agency was affirmatively sanctioning overbooking or its concealment in 1967, as Respondent claims, it would have been utterly meaningless to give passengers who are denied boarding the option "to pursue their remedy under the common law."[6] EDR-248, 38 F.R. 15083 (1973).

It is simply not a fair characterization of the Board's 1967 rulemaking action to say that candid public disclosure by an airline of its reservations practices was found to be not in the public interest, nor is it correct

[6] The implied federal cause of action arising under section 404(b) of the Aviation Act, which Respondent advances as the "common law remedy" contemplated by the Board (Resp. Br. pp. 44-45), is available only in unusual circumstances where the carrier not only oversells a flight, but then compounds the problem by accommodating individuals on a discriminatory basis and in violation of its own established priority rules. The CAB's rules have never suggested that this type of action is the sole civil remedy available to bumped passengers, or that it would preclude other, more traditional common law actions under state law.

to conclude that the CAB's regulatory scheme "treats nondisclosure of overbooking not to be deceptive," as Respondent asserts. (Resp. Br. pp. 16, 20, 42.) Indeed, there was nothing in the Board's 1967 rulemaking record to suggest that any carriers were misrepresenting or concealing material facts. What the Board has said is that it will impose the minimum possible regulation on the carriers' reservations systems to assure fair and nondiscriminatory treatment of passengers who are denied boarding. Whether or not an airline chooses to overbook its flights, and how it manages its reservations system, are matters that have been left entirely up to management discretion; and if overbooking leads to oversales, the carrier is on notice that it is subject to normal rules of liability under the common law, unless the passenger voluntarily accepts the tender of liquidated damages.

The fact of the matter is that Respondent has willingly embarked on a major effort to increase its share of the market, by overbooking its flights on a regular basis and concealing this fact from the traveling public. The resulting oversales, which Allegheny's own president testified are "statistically certain" to result from its overbooking practice (JA 129), cannot be fairly described as either "rare" or "statistical aberrations" as Respondent contends. (Resp. Br. pp. 4, 5, 17, 19.) The Allegheny reservation system, quite simply, is programmed to allow a level of oversales that the company deems "acceptable" and not out of line with the rest of the industry. (JA 121-123). That program has resulted in hundreds of persons every month – year in, year out – having Allegheny flight reservations dishonored without warning. In April, 1972, when it happened to Mr. Nader, an average of 30 people a day were bumped by this one airline alone

as a result of its practice – hardly "rare" by any meaning of the word. Petitioner seeks to hold Respondent accountable for its decision to employ a system that has deceived and seriously inconvenienced thousands of passengers every year in order to enhance Allegheny's profits. Certainly nothing the CAB said or did in 1967 supports the claim that concealment or nondisclosure of material facts relating to Respondent's present reservations practices has been approved and thus immunized by the Board.

III. THIS CASE DOES NOT INVOLVE THE PRIMARY JURISDICTION DOCTRINE

Respondent also argues that the circuit court properly required referral to the CAB under the doctrine of primary jurisdiction. We disagree. All of the cases cited by respondent involved very different questions from those presented here, such as the accommodation of antitrust laws to a conflicting regulatory regime,[7] or the reasonableness of duly filed tariffs or agreements.[8] Respondent's suggestion that its concealment of overbooking has a direct relationship to passenger rates is seriously undercut by the fact that this practice is nowhere set forth or

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[7] *E.g., United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932) (injunction against anticompetitive practices possibly lawful under Shipping Act); *Far East Conference v. United States*, 342 U.S. 570 (1952) (validity of conference rate agreement); *Carnation Co. v. Pacific Westbound Conference, supra* (anticompetitive conduct arguably lawful under agency approval); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973) (propriety of actions under Commodity Exchange Act).

[8] *E.g., Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (reasonableness of rates); *Northern Pacific Ry. v. Solum*, 247 U.S. 477 (1918) (routing practices affecting tariff

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referred to in Respondent's tariffs, and concealed overbooking has never been involved in any ratemaking or similar proceeding before the CAB. The argument that federally-imposed uniformity is necessary here cannot be squared with the CAB's determination that reservations matters, including overbooking, should be left free from its direct regulation and subject to free market forces and the rules on common law liability. (See Pet. Br. pp. 34-36.)

Finally, contrary to Respondent's theory (Resp. Br. at 35), an award of punitive or treble damages on account of past conduct is not the equivalent of a judicial injunction prohibiting that conduct in the future. *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 222 (1966). An injunction has continuing mandatory effect upon the parties, and it may not be lifted by an agency such as the CAB. By contrast, if the carriers believe that a damage award against Allegheny on account of its past conduct would interfere with their ability to provide the public with air transportation, they are free to go back to

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[8] (continued) charges); *General American Tank Car Corp. v. El Dorado Terminal Co.,* 308 U.S. 422 (1940) (reasonableness of private car rates); *Thompson v. Texas Mexican R. Co.,* 328 U.S. 135 (1946) (reasonableness of rates for trackage rights); *United States v. Western Pacific R.R. Co.,* 352 U.S. 59 (1956) (construction and reasonableness of tariff classification); *Southwestern Sugar & Molasses Co. v. River Terminals Corp., supra* (reasonableness of exculpatory tariff rule); *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 72 (1970) (validity of demurrage charges under approved conference agreement); *Vogelsang v. Delta Airlines, Inc.,* 302 F.2d 709 (2d Cir.), *cert. denied,* 371 U.S. 826 (1962) (exculpatory tariff); *Lichten v. Eastern Airlines, Inc.,* 189 F.2d 939 (2d Cir. 1951) (tariff rule on liability).

the agency with a suggested method of meeting the problem directly and seek to obtain specific Board approval.[9] Thus an award of punitive damages with respect to past conduct in no way interferes with the agency's ability to carry out its regulatory policies in the future, just as Judge Fahy noted in his dissent (Pet. App. A 53) and as this Court held in *Carnation.*

CONCLUSION

Respondent advances arguments which, if adopted by this Court, would distort the regulatory scheme embodied in the Federal Aviation Act. Although the Act gives the CAB no power to approve deceptive practices, Respondent would have the Court allocate such power to it. Although the Act provides for preservation of common law remedies, Respondent would deprive the courts of their common law powers and reassign them to the CAB. Although the Board itself has adopted a regulatory scheme which includes common law remedies as an integral feature, Respondent would have the Court replace that scheme with one in which the carriers could be shielded from accountability through retroactive administrative determinations. Finally, although the Act requires the Board to decide whether or not to investigate and order prospective relief under section 411, Respondent would have the Court require the Board to make such an investigation, and to determine whether or not Respondent's past conduct should be insulated from liability. Petitioner respectfully

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[9] Indeed, this is precisely what one carrier did with an innovative tariff providing for a non-deceptive overbooking system which the Board approved in 1971. See *Delta Airlines, Inc. v. CAB,* 455 F.2d 1340 (D.C.Cir. 1971).

urges this Court to reject these arguments, and to permit the victims of deceptive airline practices to pursue their common law remedies.

Respectfully submitted,

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